October 16, 1989

James S. Scott, Regional Director
Region 32

Harold J. Datz, Associate General Counsel
Division of Advice

Service Employees International Union, Local 77;
and Central Labor Council of Santa Clara County
(Westinghouse Electric Co.)
Case 32-CC-1261

111-5000
560-2550-8301
560-2550-8333
560-2575-6701
560-2575-6767
560-5067-2050
560-7540-2070
560-7540-8060-0120
833-0175

This case was submitted for advice on the issues of whether the conduct of the Unions induced employees of neutral employers to cease performing services, within the meaning of Section 8(b)(4)(i), or coerced neutral employers, within the meaning of Section 8(b)(4)(ii), or was constitutionally protected speech, and [*FOIA Exemptions 2 and 5*

.]

FACTS

Westinghouse maintains three facilities in Sunnyvale, California, which are engaged in the production of materials for the Department of Defense: an engineering facility, a field service facility, and a manufacturing plant.[1] At the engineering and field service facilities, Westinghouse subcontracts the janitorial work. Until October 31, 1988, [2] the maintenance subcontractor was Pioneer Maintenance (Pioneer), a signatory to a collective-bargaining agreement

[1] At the manufacturing plant, Westinghouse employs janitorial employees who are represented by a local of the Machinists Union, apparently as part of the production and maintenance unit. Those janitorial employees are not involved herein.

[2] Unless otherwise noted, all dates herein are in 1988.

with Charged Party Local 77, SEIU. Westinghouse terminated its contract with Pioneer and, on November 1, subcontracted the janitorial work to Central Maintenance (Central), whose employees are unrepresented. Like the Pioneer employees before them, the Central janitorial employees generally begin their work at 2:30 p.m. Some, however, come to work earlier.

In late October, an SEIU business representative informed a Westinghouse official that if Westinghouse subcontracted to a nonunion subcontractor, "they would put out informational pickets and let everyone know there was a nonunion company in there."

The Westinghouse manufacturing facility has a main entrance, which visitors, employees, and some deliverymen use to enter the premises. On November 2, early in the morning, SEIU representatives and former Pioneer employees, apparently numbering 8-12, distributed handbills expressing their opposition to Central at the main entrance to the manufacturing plant. The investigation does not reveal how long they stayed. There is no evidence that the handbillers attempted to induce, or succeeded in inducing, anyone to refuse to perform services for Westinghouse or any other employer. On November 10, December 1, and December 8, each time for about 30 minutes between noon and 1 p.m., 10-20 individuals demonstrated at the main entrance to the manufacturing plant. The identity of the individuals involved is unclear, except that on December 1, two of the individuals were SEIU representatives. Some of the demonstrators carried signs bearing the name of Charged Party Central Labor Council. Some of the signs read: "Out with Central" and "Central Must Go"; another sign read "Justice for Janitors". However, no sign mentioned Westinghouse. Many of the demonstrators carried pushbrooms. Some had bells. One had a drum. The leader used a small bullhorn. The group chanted sayings about "justice for janitors" and "Central must go." While a Westinghouse affiant stated that on November 10 Westinghouse employees had difficulty entering the plant, the police, who were present, made no arrests. On December 8, the demonstrators were silent. However, according to a Westinghouse representative, the police informed the demonstrators that they could utilize a bullhorn. The Region has concluded that the demonstrators imposed no burden on access to the premises, and there is no evidence that the demonstrators attempted to induce, or succeeded in inducing, any individual to refuse to perform services for Westinghouse or any other employer.

The engineering facility has a main entrance, which visitors, employees, and some suppliers use to enter the promises. On December 22, starting again at about noon, a number of individuals demonstrated at the main entrance to the engineering facility. This conduct differed from the preceding conduct in that it lasted 30-45 minutes and in that 50-75 individuals participated. Two SEIU representatives were present. Some individuals carried signs similar to those used in the previous demonstrations. Some distributed handbills, on the stationary of Charged Party Central Labor Council, asking for donations for the benefit of the laid off Pioneer employees. Some rang bells and chanted loudly. Some of the demonstrators "made a surge to come inside the lobby" of the facility. The Employer locked the doors to the lobby, and informed the demonstrators they were trespassing. The police arrived and told the demonstrators they would be arrested if they did not leave. Some left, but some did not, and the police arrested seven. A Westinghouse representative told the Region that he was not certain whether any Central Maintenance employees were working at that facility at that time, nor whether SEIU had ever been advised that no Central Maintenance employees have been present at the times of the conduct at the engineering facility.

On January 5, 1989, individuals engaged in similar conduct at the main entrance to the engineering facility. This time, only eight individuals appeared, and they stayed only 20 minutes.

On the above facts, the Region has found there was no blocking of ingress or egress, and neither claim nor evidence of interference with operations.

ACTION

We conclude that the Union violated Section 8(b)(4)(ii)(B) by the threat to picket in late October and when the demonstrators tried to come inside the lobby of the Employer's premises during the December 22 demonstration. [*FOIA Exemptions 2 and 5*

.] Further, we find that the other Union conduct did not violate Section 8(b)(4)(ii)(B). The Section 8(b)(4)(i) allegation should be dismissed, absent withdrawal, in its entirety.

We find that the Union's demonstration of December 22 had a secondary objective. This is so without regard to whether the demonstration met the requirements of Moore Dry

Dock. [3] Thus, the Moore Dry Dock standards are "merely... aids in determining the underlying question of statutory violation." Plauche Electric. [4] In Rollins [5] the Board found a violation although the picketing was in compliance with Moore Dry Dock because there was evidence of an objective to enmesh a neutral in the dispute between the union and another employer by disrupting relations between the neutral and that other employer.

Here, the Union approached Westinghouse and told it in late October that "informational" picketing would begin "if there was a nonunion company in there." In Iron Workers Local 118 (Allen L. Bender, Inc., 285 NLRB No. 23 (1987), the Board found that an unqualified threat made to a neutral general contractor to picket the jobsite at which the primary employer would be working violated Section 8(b)(4)(ii)(B). And in Plumbers Local 114 (M & S Pipe and Supply Co., 277 NLRB 10 (1985), the NLRB found that a statement, without more, made to a property owner that if it did not remove a nonunion subcontractor, there would be picketing also violated Section 8(b)(4)(ii)(B). Thus, where a union approaches a neutral and threatens picketing if the primary appears on the common situs and where the union does not carefully confine its threat to lawful conduct, the statement is both evidence of the cease doing business objective and a threat within the ban of Section 8(b)(4)(ii)(B). [6] Here, the Union's statement to Westinghouse violated Section 8(b)(4)(ii)(B). Compare General Teamsters, Local No. 126 (Ready Mixed Concrete, Inc.), 200 NLRB 253, fn. 2, 275 (1972) with Amalgamated Packinghouse (Packerland Packing), 218 NLRB 853 (1975). The threat here, unlike the lawful threat in Packerland, was not carefully confined to a threat to engage only in lawful conduct. While the threat here referred to "informational" picketing, this factor warrants no difference in result. The Board has often found picketing with signs which (l)

---

[3] 92 NLRB 547 (1950).

[4] International Brotherhood of Electrical Workers, Local 861 (Plauche Electric Inc.), 135 NLRB 250, 255 (1962). In Plauche Electric, the picketing was held to be lawful although it did not comply in all respects with the standards of Moore Dry Dock. Accord, General Teamsters, Local No. 126 (Ready Mixed Concrete. Inc.), 200 NLRB 253, 254 (1972).

[5] Local No. 441, Electrical Workers (Rollins Communications, Inc.), 208 NLRB 943, 944 (1974), remanded 510 F. 2d 1274 (D.C.Cir. 1975), reaffirmed 222 NLRB 99 (1976), enfd. 97 LRRM 3228 (D.C.Cir. 1977).

[6] Where the union threatens conduct aimed at a primary, the threat may manifest a cease doing business objective, even if the threat is specifically limited to lawful conduct.

contained no call for action[7] (2) and/or claimed on their faces to be informational[8] (3) and/or claimed on their faces to be addressed to the public [9] to be coercive. Moreover, the Board has (4) found threats to engage in informational picketing to be coercive. [10]

Further, we find that the Union engaged in conduct not privileged by the Act when it engaged in the December 22 "surge to come inside the lobby," in support of its cease doing business objective. There was a literal trespass and a threat of further trespass that the actions of the police prevented. Trespass has long been deemed coercive and unlawful under the Act. [11] As this was coercive conduct with a secondary objective, the Union thereby violated Section 8(b)(4)(ii)(B) by this conduct during the December 22 demonstration.

We concluded that the other Union conduct was not picketing within Section 8(b)(4)(ii)(B). In Alden Press, [12] the Board held that the patrolling and carrying of placards at places apart from the neutral premises -- shopping centers and city and county buildings -- was not picketing because it involved no confrontation with the neutral employer's employees, customers, or suppliers, and was instead protected by the publicity proviso. The Board at p. 1669 noted that this activity was not "intended to halt deliveries or to cause employees to refuse to perform services, and it did not in fact produce such results."

---

[7] IBEW Local 11 (L.G. Electric Contractors), 154 NLRB 766 (1965) ("[The primary] does not pay the prevailing wage conditions."); Plumbers Local 32 (A&B Plumbing), 171 NLRB 498 (1968) ("[The primary] is in violation of the [union] and its affiliates."); Local 134, IBEW (Polly Electric Co.), 175 NLRB 507 (1969) ("Electrical work being installed in this building is being done by employees who do not receive the prevailing rate[s]...." and "Substandard wages and working conditions destroy higher union standards."); Carpenters District Council of N.W. Montana (Lilienthal Insulation Co.), 220 NLRB 1241 (1975) (The neutral "refuses to comply with its contract on area standards.")

[8] National Maritime Union of America, AFL-CIO (Houston Maritime Association). 147 NLRB 1243 (1964), enfd. 342 F.2d 538 (2d Cir. 1975), cet. denied 382 U.S. 835 ("Information picketing. [The rival union] interfere[s] with employers who lawfully recognize [the picketing union]").

[9] Local 134,IBEW (Polly Electric Co.), supra, ("Notice to the public. Electrical work being installed in this building is being done by employees who do not receive the prevailing rate[s]...." and "Notice to the public. Substandard wages and working conditions destroy higher union standards.")

[10] Local 134, IBEW (Polly Electric Co.), supra, at p. 510.

[11] District 65, Retail, Whlse. & Dept. Store Union (B. Brown Associates), 157 NLRB 615 (1966), enfd. 375 F. 2d 745 (2d Cir. 1967).

[12] Chicago Typographical Union No. 16 (Alden Press, Inc.), 151 NLRB 1666 (1965).

Here the Union's handbilling and demonstrations clearly were not intended to be "signals" to induce a work stoppage or an interruption of deliveries. There was no attempt to confront approaching individuals; in fact they were ignored. Also, there was no patrolling here. And, unlike most traditional picket lines, the demonstrations here were scheduled one week to several weeks apart for only 30 to 45 minutes between noon and 1:00 p.m.

Further, there was no actual interference with Westinghouse's operations except for the brief trespass on December 22. The Union's conduct did not cause a work stoppage by Westinghouse employees. It did not cause Westinghouse's suppliers or customers to refuse to enter the premises. Nor did it cause a consumer boycott. Also, the noise generated by the Union's demonstrations did not prevent Westinghouse from conducting its operations in the normal manner. And, except for December 22, there was no trespass. In sum, there was no appreciable interference with the Westinghouse operations.

This case differs from Alden Press in that the conduct here occurred immediately in front of the neutral premises, rather than in large public areas as in Alden. However, secondary conduct may be beyond the reach of Section 8(b)(4)(B) if the means are constitutionally or statutorily privileged. In Safeco, [13] the Supreme Court pointed out that secondary handbilling would have been protected by the publicity proviso to Section 8(b)(4). And in DeBartolo II, [14] the Court construed the Act so as to avoid First Amendment problems, and at p. 2006 explicitly rejected the contention that "any kind of handbilling, picketing, or other appeals to a secondary employer to cease doing business with the [primary]... is 'coercion' within the meaning of 8(b)(4)(ii)(B)." The Court stated that mere persuasion of customers not to patronize neutral establishments does not thereby coerce the establishments within the meaning of Section 8(b)(4)(ii). Here, a finding that the handbilling and demonstrations (apart from the December 22 trespass) constituted Section 8(b)(4) conduct would raise serious constitutional questions. Consequently,

---

[13] NLRB v. Retail Clerks Local 1001 (Safeco Title Insurance Co., 447 U.S.607, fn. 3 (1980).

[14] DeBartolo Corp. v. Florida Building & Construction Trades Council, 128 LRRM 2001 (April 20, 1988).

consistent with DeBartolo, such a result is to be avoided.[15]

The presence of substantial numbers of demonstrators in front of the neutral's entrance could be coercive. However, here as noted above, the Union's demonstrations were not intended to and did not interfere with the Employer's operations or ingress and egress. Consequently, we conclude that the Union's conduct was not 8(b)(4) coercion except for the one incident of trespass on December 22.

With respect to the Section 8(b)(4)(i)(B) allegation, the Board, long ago, held that picketing at the premises of a neutral employer is not per se inducement of employees to withhold services, and that whether the picketing union intended to so induce employees must be determined from the facts of the case.[16] Here, as noted above, the demonstrations differed sufficiently from traditional picketing as to bar the normal inference that an objective of the demonstrators was a work stoppage; there was in fact no work stoppage by Westinghouse employees, its suppliers or customers. Accordingly, there is not the slightest evidence that the Union sought to induce employees of the neutral or its suppliers to withhold services, and the charge fails insofar as it alleges Section 8(b)(4)(i).

[*FOIA Exemptions 2 and 5*

---

[15] Indeed, DeBartolo offers a stronger case for establishing Section 8(b)(4) conduct. In that case, unlike here, the union sought a consumer boycott of neutrals.

[16] Upholsters Frame and Bedding Workers, Inc. (Minneapolis House Furnishing), 132 NLRB 40 (1961), enforcement denied on other grounds, 331 F. 2d 561 (8th Cir. 1964).

.]

H.J.D.